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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09.851,456	05/08/2001	Stephen Paul Zimmerman	8074M	3630

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EXAMINER

BECKER, DREW E

ART UNIT	PAPER NUMBER
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1761

DATE MAILED: 03/28/2003

2

Please find below and/or attached an Office communication concerning this application or proceeding.

7

# Office Action Summary

Application No.

09/851,456

Applicant(s)

ZIMMERMAN ET AL.

Examiner

Drew E Becker

Art Unit

1761

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

## Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

## Status

- 1) ☐ Responsive to communication(s) filed on 24 June 2002.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

## Disposition of Claims

- 4) ☐ Claim(s) 1-21 is/are pending in the application.
- 4a) Of the above claim(s) 19-21 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☐ Claim(s) 1-18 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

## Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
- 11) ☐ The proposed drawing correction filed on \_\_\_\_\_ is: a) ☐ approved b) ☐ disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.
- 12) ☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. §§ 119 and 120

- 13) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).  
a) ☐ All b) ☐ Some \* c) ☐ None of:  
1. ☐ Certified copies of the priority documents have been received.  
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.  
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).  
\* See the attached detailed Office action for a list of the certified copies not received.
- 14) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. § 119(e) (to a provisional application).  
a) ☐ The translation of the foreign language provisional application has been received.
- 15) ☐ Acknowledgment is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

## Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☒ Information Disclosure Statement(s) (PTO-1449) Paper No(s) 5-6
- 4) ☐ Interview Summary (PTO-413) Paper No(s) \_\_\_\_\_
- 5) ☐ Notice of Informal Patent Application (PTO-152)
- 6) ☐ Other: \_\_\_\_\_

## **DETAILED ACTION**

### ***Information Disclosure Statement***

1. The information disclosure statement filed October 1, 2001 fails to comply with the provisions of 37 CFR 1.97, 1.98 and MPEP § 609 because the three "Sample" references do not include a date. In addition it is not clear which of the two "Consumer Bases Test" is which. Although, the examiner telephoned Theodore P. Cummings regarding this matter, it is respectfully requested that this response also be put in writing so as to make the record clear. Mr. Cummings indicated that the "Torengos" picture was probably the 1999 test and that "Eagle" picture was probably the 1997 test.

### ***Specification***

2. The disclosure is objected to because of the following informalities: the attorney docket numbers should be removed when referring to an application as done on page 1. Appropriate correction is required.

### ***Election/Restrictions***

3. Restriction to one of the following inventions is required under 35 U.S.C. 121:
- I. Claims 1-18, drawn to a snack piece, classified in class 426, subclass 138.
  - II. Claims 19-21, drawn to a method for making a snack piece, classified in class 426, subclass 512.

The inventions are distinct, each from the other because of the following reasons:

Art Unit: 1761

4. Inventions I and II are related as process of making and product made. The inventions are distinct if either or both of the following can be shown: (1) that the process as claimed can be used to make other and materially different product or (2) that the product as claimed can be made by another and materially different process (MPEP § 806.05(f)). In the instant case the product of group I as claimed can be made by another and materially different process, for instance without cooking while in a mold.

5. Because these inventions are distinct for the reasons given above and have acquired a separate status in the art as shown by their different classification, restriction for examination purposes as indicated is proper.

6. Because these inventions are distinct for the reasons given above and the search required for Group I is not required for Group II, restriction for examination purposes as indicated is proper.

7. During a telephone conversation with Theodore Cummings on March 18, 2003 a provisional election was made with traverse to prosecute the invention of group I, claims 1-18. Affirmation of this election must be made by applicant in replying to this Office action. Claims 19-21 are withdrawn from further consideration by the examiner, 37 CFR 1.142(b), as being drawn to a non-elected invention.

8. Applicant is reminded that upon the cancellation of claims to a non-elected invention, the inventorship must be amended in compliance with 37 CFR 1.48(b) if one or more of the currently named inventors is no longer an inventor of at least one claim remaining in the application. Any amendment of inventorship must be accompanied by a request under 37 CFR 1.48(b) and by the fee required under 37 CFR 1.17(i).

***Claim Rejections - 35 USC § 112***

9. The following is a quotation of the first paragraph of 35 U.S.C. 112:

The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same and shall set forth the best mode contemplated by the inventor of carrying out his invention.

10. Claim 2 is rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to enable one skilled in the art to which it pertains, or with which it is most nearly connected, to make and/or use the invention. Claim 2 refers to an "engagement span". However, the specification does not describe what an engagement span is, or how it is calculated.

11. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

12. Claims 2, 7, 9, 14, and 16 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

13. Claim 2 recites an "engagement span". It is not clear what an "engagement span" is, or how it is calculated.

14. Claim 7 recites the limitation "said base". There is insufficient antecedent basis for this limitation in the claim.

15. Claim 9 recites the limitation "said restricted end". There is insufficient antecedent basis for this limitation in the claim.

Art Unit: 1761

16. Claim 14 recites "said nested arrangement is consistent". It is not clear what type of arrangement would be considered "consistent".

17. Claim 16 recites the limitation "said restricted end". There is insufficient antecedent basis for this limitation in the claim.

### ***Claim Rejections - 35 USC § 102***

18. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

19. Claims 1-4, 9, 12, and 16-17 are rejected under 35 U.S.C. 102(b) as being anticipated by Hreschak [Des. 212,070].

Hreschak teaches a snack product comprising a body curved about a first axis thus forming a dip containment region with an open end, sides which are not parallel to the axis, restriction of movement to the sides and rear, an engagement span which is 90% of the vertical span, the axis being perpendicular to the open end, sidewalls, a restricted end which is less than 75% of the open end width, a vertical taper of less than 45°, and a varying radius of curvature along its length (Figures 1-4).

Art Unit: 1761

20. Claims 1-5, 8-9, 12-14, and 17-18 are rejected under 35 U.S.C. 102(e) as being anticipated by McNeel et al [Pat. No. 6,412,397].

McNeel et al teach a snack product comprising a body curved about a first axis thus forming a dip containment region with an open end, sides which are not parallel to the axis, restriction of movement to the sides, an engagement span which is 90% of the vertical span, the axis being perpendicular to the open end, sidewalls, a vertical taper of less than 45°, an equilateral triangle shape, plural snack products nested in cans, and a segment of a right cone (Figure 10; column 9, lines 26-60).

***Claim Rejections - 35 USC § 103***

21. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

22. Claims 10-11 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak.

Hreschak teaches the above mentioned components. Hreschak does not mention a length of 30-110mm, a radius of curvature of 15-500mm, or an open end width of 15-75mm. It would have been obvious to one of ordinary skill in the art to use these sizes in the snack product of Hreschak since snack chips, such as Doritos, Pringles, and Fritos; were commonly made in these sizes, since Hreschak lacks any mention of size, and

Art Unit: 1761

since consumers preferred snack foods this size as the snack foods fit their hands better.

23. Claims 10-11 and 15 are rejected under 35 U.S.C. 103(a) as being unpatentable over McNeel et al.

McNeel et al teach the above mentioned components. McNeel et al do not mention a length of 30-110mm, a radius of curvature of 15-500mm, or an open end width of 15-75mm. It would have been obvious to one of ordinary skill in the art to use these sizes in the snack product of McNeel et al since snack chips, such Doritos, Pringles, and Fritos; were commonly made in these sizes, since McNeel et al lacks any mention of size, and since consumers preferred snack foods this size as the snack foods fit their hands better.

24. Claims 5 and 8 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak as applied above, in view of McNeel et al.

Hreschak teaches the above mentioned components. Hreschak does not teach an equilateral triangle shape. McNeel et al teach a snack food with an equilateral triangle shape (Figure 10). It would have been obvious to one of ordinary skill in the art to incorporate the shape of McNeel et al into the snack product of Hreschak since both are directed to snack foods, since Hreschak already had a generally triangular shape (Figure 1), and since an equilateral triangle shape was commonly used for snack food products as shown by McNeel et al (Figure 10).

25. Claims 5-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak as applied above, in view of Blish [Des. 166,524].



Art Unit: 1761

Hreschak teaches the above mentioned components. Hreschak does not teach an isosceles triangle shape. Blish teaches a food product with a dip containment region and an isosceles triangle shape (Figures 1-3). It would have been obvious to one of ordinary skill in the art to incorporate the shape of Blish into the food product of Hreschak since both are directed to scoop shaped foods, since Hreschak already had a generally triangular shape (Figure 1), and since an isosceles triangle shape was commonly used for snack food products as shown by Blish (Figures 1-3).

26. Claims 6-7 are rejected under 35 U.S.C. 103(a) as being unpatentable over McNeel et al as applied above, in view of Blish [Des. 166,524].

McNeel et al teach the above mentioned components. McNeel et al do not teach an isosceles triangle shape. Blish teaches a food product with a dip containment region and an isosceles triangle shape (Figures 1-3). It would have been obvious to one of ordinary skill in the art to incorporate the shape of Blish into the food product of McNeel et al since both are directed to scoop shaped foods, since McNeel et al already had a triangular shape (Figure 1), and since an isosceles triangle shape was commonly used for snack food products as shown by Blish (Figures 1-3).

27. Claims 13-14 are rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak as applied above, in view of Bezek et al [Pat. No. 6,472,007].

Hreschak teaches the above mentioned components. Hreschak does not teach a nested arrangement. Bezek et al teach a snack food product in a nested arrangement (column 7, line 16). It would have been obvious to one of ordinary skill in the art to incorporate the nested arrangement of Bezek et al into the product of Hreschak since

Art Unit: 1761

both are directed to snack food products, since Hreschak already had a consistent shape, and since snack foods were commonly placed in nested arrangements, as shown by Bezek et al (column 7, line 16), in order to reduce their overall volume and thus reduce shipping costs.

28. Claim 18 is rejected under 35 U.S.C. 103(a) as being unpatentable over Hreschak as applied above, in view of Ipema [Des. 300,199].

Hreschak teaches the above mentioned components. Hreschak does not teach a segment of a right cone. Ipema teaches a scoop in the shape of a segment of a right cone (Figures 1-4). It would have been obvious to one of ordinary skill in the art to incorporate the shape of Ipema into the product of Hreschak since both are directed to scooping products, since Hreschak already included sidewalls and a curved scoop region (Figures 1-4), and since scoops commonly had the shape of a segment of a right cone, as shown by Ipema (Figures 1-4).

29. Claim 16 is rejected under 35 U.S.C. 103(a) as being unpatentable over McNeel et al as applied above, in view of Hreschak.

McNeel et al teach the above mentioned components. McNeel et al do not teach a restricted end width less than 75% the width of the open end. Hreschak teaches a food product with a restricted end width less than 75% the width of the open end (Figure 1-4). It would have been obvious to one of ordinary skill in the art to incorporate the features of Hreschak into the invention of McNeel et al since both are directed to snack food products, since McNeel et al already included sidewalls which restricted motion

Art Unit: 1761

(Figure 10), and since the restricted end of Hreschak provided a means for preventing spillage of dip onto the users hand.

30. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Teras [Des. 452,360], de Leon [Des. 259,670], Wildgen [Des. 207,410], Freeman [Pat. No. 206,011], and Willard et al [Pat. No. 4,650,687] teach scoops and snacks.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Drew E Becker whose telephone number is 703-305-0300. The examiner can normally be reached on Monday-Thursday 7am-5pm.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 703-308-3959. The fax phone numbers for the organization where this application or proceeding is assigned are 703-872-9310 for regular communications and 703-872-9311 for After Final communications.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the receptionist whose telephone number is 703-308-1495.

Drew E Becker  
Examiner  
Art Unit 1761

  
March 20, 2003